

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 29, 2004

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. 03-1469-CR
STATE OF WISCONSIN**

Cir. Ct. No. 01CF001005

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARRYL WIMBISH JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: WAYNE J. MARIK, Judge. *Affirmed.*

Before Anderson, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Darryl Wimbish Jones appeals from a judgment of conviction for extortion and from an order denying his motion for postconviction relief. He argues that he was denied the effective assistance of trial counsel and that the trial court erred by admitting prejudicial character evidence and by

permitting the prosecutor to ask Jones to comment on the truthfulness of another witness's testimony. We affirm the judgment and order.

¶2 The conviction arises out of Jones's attempt to extort money from Gillian Pagliaro to ensure the safe return of her two Siberian Husky dogs. When Jones made telephone contact with Pagliaro she was not aware that her dogs were missing. Pagliaro reported that Jones demanded \$1000 for the safe return of the two dogs and threatened that he would have some pit bull dogs harm Pagliaro's dogs if the money was not produced. Police followed Pagliaro to her meeting with Jones. Jones produced the dog tag for one of Pagliaro's dogs. When arrested, Jones told the officer he knew nothing about any missing dogs but that a "Mexican" had offered him \$50 to meet Pagliaro at that location. At trial Jones maintained that he had only asked Pagliaro if there was a reward for finding the dogs. Part of his theory of defense was that the incident was driven by Pagliaro's racial animus towards him. The jury found Jones guilty of extortion.

¶3 Jones first argues that he was denied the effective assistance of counsel. A claim of ineffective assistance of trial counsel requires the defendant to show that counsel's representation was deficient and prejudicial. *State v. Thiel*, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305. Whether counsel's actions constitute ineffective assistance is a mixed question of law and fact. *Id.*, ¶21. The trial court's findings of what counsel did and the basis for the challenged conduct are factual and will be upheld unless clearly erroneous. *Id.* However, whether counsel's conduct amounted to ineffective assistance is a question of law which we review de novo. *Id.*

¶4 At trial Pagliaro testified that her dogs were purebred and had very mild and loving temperaments. She described that after finding one of the dogs,

the dog appeared to be very shaken up and scared but that she did not see any bleeding, cuts or broken bones. She also indicated that the dog shied away from people, leading her to believe that someone had hit the dog. Jones argues that counsel should have objected to this testimony about the dogs since it was irrelevant and tended to elicit jury sympathy. Trial counsel indicated that he did not object to the testimony because he believed it aided the defense by supporting Jones's contention that he had found the dogs by accident and that because of their recognizable value, the owner might offer a reward for their return. Counsel explained that the information was helpful because he was precluded from offering evidence about how the dogs came into Jones's possession and that they had run away before. Counsel considered Pagliaro's opinion that the dog had been hit to somewhat draw into question Pagliaro's credibility since there was other testimony that the dogs were not injured in any way. Also, Pagliaro's admission that the dog did not appear physically harmed tended to rebut her testimony that while on the phone with Jones, she heard the dog cry with pain in the background. The trial court found that counsel had a strategic reason for not objecting to Pagliaro's narrative about the dogs.

¶5 We are not to second-guess trial counsel's selection of trial tactics or the exercise of professional judgment after weighing the alternatives. *See State v. Felton*, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983). Counsel's decision not to object was based on an evaluation of how the testimony fit with the theory of defense and a gap in proof about how Jones came into possession of the dogs. A reasoned and sound strategy decision was made, and the failure to object was not deficient performance.

¶6 A police detective testified about the initial statement Jones made at the police station.¹ In his trial testimony, Jones admitted he had given a false statement to the officer. He indicated that he did so because the investigator had asked him to just tell him something to write down in the report because it was close to shift-change time and people wanted to go home. On cross-examination, the prosecutor challenged Jones's testimony that the detective was just looking for any story. The following exchange occurred:

Q: Before he interviewed you the information he gave you was that they wanted to find the dogs. They were concerned about the dogs. And he wanted to know where they were, correct?

A: That is not what he told me. He told me that Mrs. Pagliaro had stated to them that I had stolen her dogs.

Q: That's what Investigator Holter told you?

A: That's what he told me.

Q: You heard him testify here today in court that he never told you that, correct?

A: That is what he told me, ma'am.

Q: So he was not truthful when he testified?

A: I don't know what line of questioning came out of his mouth, but that is what he told me.

Q: You heard him testify here today in court, correct?

A: I heard what he said.

¹ Jones said eight or nine persons were fighting pit bulls in a backyard and Jones observed the two Siberian Husky dogs lying in that yard suffering from significant dog bites. Jones asked "Jose" if he could take one of the dog tags in order to make some money from the owner. "Jose" kept the tag and offered Jones \$50 to meet the owner.

¶7 Jones contends that trial counsel was ineffective for not objecting to the prosecutor's questions asking Jones to comment on the truthfulness of the detective's testimony. Trial counsel explained that in the context of the trial it did not appear to him that the questions improperly asked for Jones's opinion on truthfulness in violation of *State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984) ("No witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth."). However, counsel conceded that at least one of the questions was objectionable and he should have objected.

¶8 Although in hindsight trial counsel thought the cross-examination was objectionable, *State v. Johnson*, 2004 WI 94, ¶15, 273 Wis. 2d 626, 681 N.W.2d 901, holds otherwise.² In *Johnson*, the supreme court discussed the two lines of cases that address a witness being questioned about another witness's testimony. *Id.*, ¶13 (the two lines of cases are those that arise from the testimony of an expert witness elicited on direct examination, starting with *Haseltine*, 120 Wis. 2d 92, and those that focus on conflicting eyewitness accounts brought out on cross-examination). Here, like in *Johnson* and *State v. Bolden*, 2003 WI App 155, 265 Wis. 2d 853, 667 N.W.2d 364, *review denied*, 2003 WI 126, 265 Wis. 2d 419, 668 N.W.2d 559 (No. 02-2974-CR), we are dealing with cross-examination designed to highlight the conflicts between the testimony of two eyewitnesses to an event and it was not offered to bolster the credibility of the other witness.

² We review a claim of ineffective assistance of counsel based on the law in place at the time of the appeal. *State v. Silva*, 2003 WI App 191, ¶11, 266 Wis. 2d 906, 670 N.W.2d 385, *review denied*, 2004 WI 1, 268 Wis. 2d 133 and 134, 673 N.W.2d 691 and 692 (Nos. 02-1502-CR, 02-2050-CR), *cert. denied*, *Silva v. Wisconsin*, 124 S. Ct. 2176 (U.S. Wis. May 17, 2004) (No. 03-1320).

Johnson holds that “[s]uch a technique is permissible cross-examination.” *Johnson*, 273 Wis. 2d 626, ¶20 (footnote omitted). Thus, trial counsel’s failure to object to that portion of Jones’s cross-examination was not deficient or prejudicial performance. *See id.*, ¶24.

¶9 Jones also faults trial counsel for not objecting to the police detective’s testimony about the manner in which Jones read aloud the waiver of rights form at the beginning of the interview. The detective indicated that after reading a few sentences, Jones purposely lowered his voice so that the detective could not hear him. The detective stopped him and asked Jones to start over. Jones read a few sentences and then again lowered his voice so that the detective had to stop him. Jones argues that this testimony was irrelevant, highly prejudicial, and was improper bad-character evidence under WIS. STAT. § 904.04(2) (2001-02).³

¶10 Trial counsel testified that he did not object to the detective’s testimony because it helped portray Jones as frustrated and angry over what he considered to be a wrongful arrest in his kind attempt to return the dogs. Counsel explained that he and Jones had discussed that aspect of the theory of defense in anticipation that Jones would testify. Counsel’s strategy reason for not objecting was based on proper considerations and consistent with the theory of defense. Trial counsel was not deficient for utilizing that strategy.

¶11 Jones next argues that over his objection, the trial court improperly allowed the police detective to repeat Jones’s comments about being bothered by

³ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

seeing the detective's firearm and being able to disarm the detective if he manipulated his handcuffs to the front. Jones contends the testimony was irrelevant, prejudicial in light of the credibility battle between Jones and Pagliaro, and that it was just more improper bad-character evidence. He points out that the prosecutor mentioned this testimony in closing argument to suggest that Jones was playing around with the police officer.

¶12 In response, the State first argues that Jones's simple "relevance" objection at trial was insufficient to preserve an appellate challenge under WIS. STAT. § 904.04. We do not agree. The inquiry is whether the objection alerted the trial court of its basis. *State v. Agnello*, 226 Wis. 2d 164, 174, 593 N.W.2d 427 (1999). Here the trial court did not suggest it lacked sufficient information about the nature of the objection to make the ruling at trial.

¶13 Evidentiary rulings, particularly relevancy determinations, are left to the discretion of the trial court and will not be upset on appeal unless the court erroneously exercised its discretion. *See Shawn B.N. v. State*, 173 Wis. 2d 343, 366-67, 497 N.W.2d 141 (Ct. App. 1992). We will affirm the trial court's discretionary ruling if it is supported by a logical rationale, is based on facts of record and involves no error of law. *Id.* at 367. In its postconviction ruling, the trial court observed that evidence of Jones's comments about the detective's gun was relevant to credibility and the context of the interrogation. There was a dispute about what occurred during Jones's initial police interview and particularly Jones's claim that he was prompted by the detective to give a false initial statement. That the detective testified before Jones gave his version of what occurred does not matter. Jones's comments about the detective's gun were part of the entire interview process and indicative of how Jones perceived the process. The jury was entitled to hear the full exchange between Jones and the detective in

order to make the credibility determination. The trial court properly exercised its discretion in admitting the challenged testimony.

¶14 Jones's final claim is that the prosecutor improperly and repeatedly asked Jones to comment on the truthfulness of the police detective's trial testimony. In addressing Jones's ineffective assistance of trial counsel claim, we determined that under *Johnson*, 273 Wis. 2d 626, ¶20, the prosecutor's cross-examination was not improper. We need not revisit the issue.

By the Court.—Judgment and order affirmed.

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

