COURT OF APPEALS
DECISION
DATED AND FILED

December 12, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP474-CR **Cir. Ct. No. 2004CF3294**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEE VERNON WEDDLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 CURLEY, J. Lee V. Weddle appeals from the judgment of conviction entered after a jury convicted him of recklessly endangering safety while armed. Weddle contends that he is entitled to reversal of the trial court's judgment and a new trial on grounds that his trial counsel provided ineffective

assistance by failing to investigate and present certain other acts evidence. We reject Weddle's argument because the evidence he claims his trial counsel failed to investigate and present would not have been admissible as other acts evidence. Therefore, we affirm.

I. BACKGROUND.

¶2 In the evening of June 24, 2004, Weddle and Jacquelene Moorer, his live-in girlfriend, got into an argument at their mutual residence. Weddle, who had been drinking, was calling Moorer names, so Moorer decided to go to her mother's house to allow Weddle to "cool off." She walked onto the front porch to wait for her mother to pick her up. At this point, Weddle came out to the porch with a knife, grabbed Moorer by her hair, and placed the knife on her neck. A struggle ensued. Moorer attempted to grab the knife, but Weddle moved it back such that the blade cut four of her fingers. Moorer then tried to get away, but Weddle chased her down the sidewalk. Weddle caught up with Moorer and threw her on the ground, cut her in the shoulder, leg and foot, banged her head against the pavement, punched her, and threatened to kill her. DeWayne and Marilyn Buchanan, neighbors of Weddle and Moorer, witnessed the struggle on the street and called 911. Moorer's hand-injuries necessitated emergency surgery.

¶3 Weddle was charged with second-degree recklessly endangering safety while armed, contrary to WIS. STAT. §§ 940.30(2) and 939.63(1) (2003-04).[1] He pled not guilty,[2] and the case was tried to a jury. Moorer testified

[1] All references to the Wisconsin statutes are to the 2003-04 version unless otherwise noted.

[2] Weddle originally entered a plea of not guilty by reason of mental disease or defect, but later withdrew the plea and entered a plea of not guilty instead.

that Weddle attacked her and threatened to kill her. Weddle admitted that he and Moorer had argued, but testified that it was Moorer who had grabbed a knife and that he had taken it away from her. He denied punching, hitting or stabbing Moorer, or banging her head against the pavement, and stated that he did not know how she was injured. The Buchanans corroborated Moorer's version of the events on the street, both testifying that they saw Weddle standing over her with a knife in his hand, cutting her and threatening to kill her, and that she was screaming for him to stop. The jury, which was given the self-defense instruction, found Weddle guilty. At his sentencing, Weddle told the court that he could not remember any of the events because he was intoxicated. He was sentenced to nine years' imprisonment, comprised of four years' initial confinement, followed by five years' extended supervision. Judgment was entered accordingly.

¶4 Weddle filed a postconviction motion, asserting that his trial counsel had been ineffective for failing to investigate and seek admission of allegedly exculpatory other acts evidence; evidence regarding a 1989 incident in which Moorer injured a female stranger with a knife during a street fight. Moorer had pled guilty to the offense. Weddle's motion also claimed that he had acted in self-defense, and that Moorer injured herself during the struggle. The trial court denied Weddle's motion, reasoning that even if Weddle's trial counsel had sought to introduce the evidence, it would not have been admitted because, assuming that it would have been offered for an acceptable purpose, the fifteen-year-old incident would not have been relevant to this case and, even if it would have been relevant, its probative value would have been substantially outweighed by the danger of unfair prejudice or confusion of the issues. The evidence thus would not have satisfied the requirement for admission as other acts evidence. Weddle appeals the denial of his postconviction motion.

II. ANALYSIS.

¶5 To succeed on an ineffective assistance of counsel claim, the defendant must show both that counsel's representation was deficient and that the deficiency was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); *see* ***State v. Sanchez***, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). To prove deficient performance, the defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. To satisfy the prejudice prong, a defendant must demonstrate that there is a reasonable probability that, but for counsel's alleged errors, the outcome of the proceeding would have been different. ***Id.*** at 694. A court need not address both components if the defendant does not make a sufficient showing on one. ***Id.*** at 697.

¶6 Our standard for reviewing this claim involves mixed questions of fact and law. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The trial court's determinations of what the attorney did, or did not do, and the basis for the challenged conduct are factual and will be upheld unless they are clearly erroneous. *See* ***id.*** The ultimate conclusion, however, of "whether the attorney's conduct resulted in a violation of defendant's right to effective assistance of counsel is a question of law," which we review independently. ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987). Failure to move to admit evidence may constitute ineffective assistance. *See* ***State v. Jackson***, 229 Wis. 2d 328, 344, 600 N.W.2d 39 (Ct. App. 1999).

¶7 Weddle contends that his trial counsel was ineffective for failing to investigate and present other acts evidence that he claims is "materially exculpatory."

¶8 The admission or exclusion of evidence is within the sound discretion of the trial court. ***State v. Volk***, 2002 WI App 274, ¶17, 258 Wis. 2d 584, 654 N.W.2d 24. "A reviewing court will sustain a discretionary ruling if the trial court examined the relevant facts, applied the proper standard of law and, using a rational process, reached a conclusion a reasonable judge could reach." ***Id.*** "Where the trial court fails to adequately explain the reasons for its decision, we will independently review the record to determine whether it provides a reasonable basis for the trial court's discretionary ruling." ***State v. Clark***, 179 Wis. 2d 484, 490, 507 N.W.2d 172 (Ct. App. 1993).

¶9 In exercising discretion regarding other acts evidence, the trial court must apply the three-step analytical framework set forth by the supreme court in ***State v. Sullivan***, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998). First, the court must determine whether the other acts evidence is offered for a permissible purpose under WIS. STAT. § 904.04(2),[3] such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ***Sullivan***, 216 Wis. 2d at 772. Second, the court must determine whether the other acts evidence is relevant under WIS. STAT. § 904.01.[4] ***Sullivan***, 216 Wis. 2d at 772. Third, the court must determine whether the probative value of the evidence

[3] WISCONSIN STAT. § 904.04(2) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[4] WISCONSIN STAT. § 904.01 defines "relevant evidence" as: "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

is substantially outweighed by the danger of unfair prejudice, confusion of the issues, waste of time, or other similar concerns. ***Id.*** at 772-73.

¶10 The proponent of the other acts evidence bears the burden of establishing the relevance of that evidence, and the opponent of the admission must show that the probative value of the evidence is substantially outweighed by unfair prejudice. ***State v. Hunt***, 2003 WI 81, ¶53, 263 Wis. 2d 1, 666 N.W.2d 771. Upon review, we may affirm the trial court's decision for reasons other than those stated by the court. ***Id.***, ¶52.

¶11 Weddle argues that the evidence of the 1989 fight "comes in for an acceptable purpose," contending that "[i]t is admissible for purposes of motive, intent and opportunity," under the first ***Sullivan*** factor. With regard to relevance, he also insists that the evidence meets the ***Sullivan*** standard and "is highly relevant" because "[t]here was no corroboration of the complainant's testimony as to how the events began. Defendant indicated that she initially came after him with the knife. She indicated otherwise." He therefore submits that "[t]his evidence would have made Defendant's version of the events more probable than without it." On this basis, Weddle maintains that the evidence is "materially exculpatory," and concludes that trial counsel's failure to attempt to introduce it as other acts evidence constituted ineffective assistance. We disagree.

¶12 Although Weddle claims that evidence of Moorer's prior conviction shows motive, intent and opportunity, he does not explain why this is the case. Indeed, Weddle does nothing to substantiate the assertion that a 1989 street fight in which Moorer struggled with and injured another woman constitutes proof that Moorer had a motive, intent and opportunity, in 2004, to use a knife to attack Weddle.

¶13 As the State notes, rather than the claimed motive, intent and opportunity, Weddle's real purpose for seeking to admit the evidence that Moorer had previously fought someone with a knife is expressed when Weddle states that the evidence "would have made Defendant's version of the events more probable than without it." This argument shows that what Weddle is in fact arguing is that the fact that Moorer attacked someone else with a knife makes it more likely that his version of the events is true. Thus, although Weddle attempts to fit the 1989 incident under the exception under which other acts evidence is allowed "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," this evidence does not fall under any of these exceptions, but falls squarely within the general prohibition that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." WIS. STAT. § 904.04(2).

¶14 Moreover, even if the evidence would have been offered to prove motive, intent or opportunity, the 1989 fight would not have been relevant to show that Moorer had such motive, intent or opportunity. In assessing relevance, the court must first consider "whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action." ***Sullivan***, 216 Wis. 2d at 772. The court must then consider "whether the evidence has probative value, that is, whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence." ***Id.***

¶15 The fact that Moorer had a knife during a street fight with a stranger does not show that Moorer had the motive, intent or opportunity to attack her boyfriend in their home. In other words, evidence that Moorer injured a stranger with a knife in 1989 does not make it more likely that she would have done so to

Weddle during a domestic dispute in 2004.[5] The conclusion that the 1989 incident is irrelevant to this case is further bolstered by the fact that the events occurred fifteen years apart. *See* ***State v. Oberlander***, 149 Wis. 2d 132, 143, 438 N.W.2d 580 (1989) (evidence irrelevant on remoteness grounds if elapsed time is so great as to negative all rational or logical connection between fact sought to be proved and remote evidence offered in proof thereof). Although Weddle is correct in noting that passage of time alone does not necessarily make evidence irrelevant, here the long time that passed is an additional factor that supports the conclusion that the evidence was irrelevant.

¶16 Therefore, had Weddle's trial counsel sought to introduce evidence of Moorer's 1989 knifing incident, it would have been inadmissible under ***Sullivan*** not only because the evidence would not have been offered for an acceptable purpose, but also, even assuming that the purpose for which it was offered was acceptable, it would still have been inadmissible as irrelevant. Since Weddle has failed to satisfy the first two ***Sullivan*** factors, we need not consider the third. *See* ***id.***, 216 Wis. 2d at 772-73.

¶17 Because the trial court properly concluded that the evidence would have been inadmissible as other acts evidence, it follows that Weddle's trial

[5] Weddle makes numerous references to allegedly acting in self-defense. We therefore note that we agree with the State that Weddle's claim of self-defense would not have made evidence of Moorer's 1989 knife fight admissible as so-called ***McMorris*** evidence, *see* ***McMorris v. State***, 58 Wis. 2d 144, 151-52, 205 N.W.2d 559 (1973), that is, evidence of the defendant's state of mind and the defendant's beliefs regarding the victim's character. However, admission of ***McMorris*** evidence to support self-defense requires both that the defendant "establishes a factual basis for the issue of self-defense" and that the defendant have "personal knowledge of prior specific acts of violence by the victim." ***Werner v. State***, 66 Wis. 2d 736, 743, 226 N.W.2d 402 (1975). Here, Weddle does not allege and there is no indication to the effect that Weddle knew of the 1989 incidents at the time of the 2004 incident.

counsel was not ineffective for failing to investigate and present the evidence. *See* ***Strickland***, 466 U.S. at 697. Consequently, we affirm the judgment of conviction and the denial of Weddle's postconviction motion.

By the Court.—Judgment and order affirmed.

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