COURT OF APPEALS
DECISION
DATED AND FILED

December 17, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2008AP549-CR

Cir. Ct. No. 2006CF953

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TION CHARLES DALLAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: LINDA M. VAN DE WATER, Judge. *Affirmed*.

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Tion Charles Dallas appeals from a judgment of conviction of burglary and from an order denying his motion for postconviction relief. He challenges the trial court's handling of questions and a request for testimony from the jury during deliberations and argues that his trial counsel was

ineffective for not opposing the introduction of other act evidence with evidence that the other act was not unique. We reject his claims and affirm the judgment and order.

¶2 On the morning of January 30, 2004, a gas station clerk discovered that the station had been burglarized during the night. The store was ransacked, inside security cameras were destroyed, and phone and data lines had been cut. Among the merchandise strewn about the store the police found a piece of beef jerky with bite marks in it. The DNA profile from the beef jerky matched Dallas's profile. Dallas was arrested and charged with burglary.

¶3 Before trial the prosecution sought to admit the circumstances of Dallas's involvement in a burglary that occurred March 1, 2004, at a Ritz Foods store in Milwaukee county.[1] The other act evidence was offered for the purpose of identification since the Ritz Foods burglary involved a similar business, time of day, method of entry, items taken, and manner in which the store was ransacked. The prosecution argued that the similar circumstances of the crimes are unique to Dallas. Defense counsel argued that the circumstances were not unique at all and that most burglaries of convenience stores take place during overnight hours, involve gaining entry by the use of certain tools, result in the cutting of surveillance wires, and exhibit a certain amount of ransacking of the store. The circuit court granted the prosecution's motion. Dallas argues that to contradict the prosecution's argument that the circumstances of the burglary were unique to him

[1] The prosecution also sought to admit evidence that Dallas was arrested for prowling after he was discovered in a van with burglarious tools (bolt cutters, crowbars, screw drivers, two-way radios, gloves, and flashlights) at 2:03 a.m. on April 7, 2003. The circuit court denied the motion to admit this evidence.

trial counsel should have introduced evidence at the motion hearing that a burglary ring of thirty to forty people was committing area burglaries using the same methods.

¶4 A claim of ineffective assistance of counsel requires the defendant to show both that counsel's representation was deficient and that the deficiency was prejudicial. ***State v. Cooks***, 2006 WI App 262, ¶33, 297 Wis. 2d 633, 726 N.W.2d 322. Appellate review of an ineffective assistance of counsel claim requires us to uphold the trial court's findings of fact unless they are clearly erroneous. ***Id.***, ¶34. The ultimate determination of whether the attorney's performance falls below the constitutional minimum is a question of law subject to our independent review. ***Id.***

¶5 In order to establish deficient performance, a defendant must establish that counsel's conduct falls below an objective standard of reasonableness. ***Id.***, ¶33. As to 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Id.*** If we conclude on a threshold basis that the defendant could not have been prejudiced by trial counsel's performance, we need not address whether such performance was deficient. *See* ***State v. Kuhn***, 178 Wis. 2d 428, 438, 504 N.W.2d 405 (Ct. App. 1993). Here we move directly to the second prong of the test because we conclude that Dallas could not have been prejudiced by his trial counsel's performance at the pretrial motion hearing.

¶6 Trial counsel testified that she was aware of the burglary ring and that she did not offer evidence about it because Dallas was considered a member

of the ring. A Milwaukee county detective confirmed that Dallas was an identified member of the burglary ring. Even at the pretrial motion hearing the circuit court recognized that the pattern of both crimes was the work of a burglary ring: "[C]learly, that is an imprint of the defendant and his cohorts as to how these burglaries are committed." Had trial counsel established the existence of the burglary ring, evidence of the Ritz Foods burglary in which Dallas's involvement was confirmed was no less probative as to his identity or participation in the charged offense. The burglary ring and Dallas's confirmed membership in the ring strengthens the probative value of the other act evidence. Thus, evidence of the burglary ring would not have changed the ruling on the admission of the circumstances of Dallas's Ritz Foods burglary.[2] Further, the DNA matching evidence confirmed Dallas's presence at the charged burglary even if it is considered the work of the burglary ring. Dallas's trial counsel was not constitutionally deficient at the pretrial motion hearing.

¶7 During deliberations the jury sent out five written questions:

1. Residence of Tion Dallas at the time?
2. Where was Tion Dallas employed?
3. Does Tion Dallas have an alibi for the night of the burglary?
4. We want written testimony of Habush [defense counsel] cross of Detective Cybell.

[2] Counsel also advanced a strategy reason for not putting in evidence of the burglary ring. Counsel was afraid of opening the door to the admission of evidence of Dallas's involvement in the burglary ring and the numerous others crimes committed by the ring. "A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel." ***State v. Elm***, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996).

5. How can we interpret Ritz Foods burglary?

The trial court and the parties agreed that in response to question five the jury was to be advised to re-read the instructions about the use of other act evidence. The trial court and the parties also agreed that the jury was to be told that no answer could be provided to questions one, two and three. With respect to the request for the written testimony, defense counsel indicated no objection to reading to the jury a specific portion of the detective's cross-examination. The trial court disapproved of that approach as highlighting one specific portion of the testimony in what was only a one-day trial. In response to the questions a note went back to the jury:

> The Court is unable to give you specific answers to your questions. You must rely upon your collective memories, notes, recollection of testimony you heard, and exhibits admitted as evidence in this case. You should also rely upon the written instructions as given to you by the court and may refer to them in your deliberations.

¶8 Dallas attacks the trial court's response to the jury on two fronts. He first argues that based on the jury's questions about his residence, employment and alibi, the trial court erred in not instructing the jury that he had a right not to testify and that the absence of evidence on those inquiries should not raise an inference of guilt. With respect to the jury's request for the written cross-examination of the detective, Dallas argues that the trial court should have read the detective's cross-examination to the jury.[3]

[3] The jury asked for the testimony to be provided to it in written form. ***State v. Rutchik***, 116 Wis. 2d 61, 80, 341 N.W.2d 639 (1984), recognizes that it is better practice to read testimony to the jury rather than send it to the jury room in written form so as to avoid an unfair advantage for one side. *See also* ***Payne v. State***, 199 Wis. 615, 629, 227 N.W. 258 (1929) (there can be an undue advantage to one side by allowing the jury to have written portion of some testimony in the jury while compelling the jury to rely upon their memories for the testimony on the other side). No error can be assigned to the trial court's refusal to provide the jury with the written testimony.

¶9 The jury was instructed that Dallas had an absolute constitutional right to testify and that his decision not to testify could not influence the verdict. It was also instructed that a criminal defendant is presumed innocent and is not required to prove innocence. Dallas contends that the jury's questions about his residence, employment, and alibi demonstrated that the jury misunderstood his constitutional right to remain silent.[4] He argues that the trial court did not do enough to clarify the law on that point. *See* ***Bollenbach v. U.S.***, 326 U.S. 607, 612-13 (1946) ("[w]hen a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy.").

¶10 Because the jury had already been instructed about Dallas's right to remain silent, the issue is whether the trial court should have re-instructed the jury. The trial court has broad discretion in deciding whether to re-instruct the jury. ***State v. Hubbard***, 2008 WI 92, ¶29, __ Wis. 2d __, 752 N.W.2d 839 (WI Jul. 15, 2008) (No. 2006AP2753). In light of the immediate agreement between the parties that the three questions could not be answered, there was no discussion about the need to re-instruct the jury about Dallas's right to remain silent. However, the record supports the discretionary decision made but not explained. *See* ***State v. Alsteen***, 108 Wis. 2d 723, 728, 324 N.W.2d 426 (1982) ("The failure of the trial court to set forth its reasoning requires us to independently review the evidence to determine whether it supports the trial court's decision."). The jury was given a set of the instructions and those instructions fully and properly stated

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[4] We need not decide whether we share Dallas's view that the jury's questions reflect a misunderstanding of his right to remain silent. The jury was indicating it wanted facts not of record. The jury is not entitled to information just because the jury believes it is important to its decision. ***State v. Hubbard***, 2008 WI 92, ¶57, __ Wis. 2d __, 752 N.W.2d 839 (WI Jul. 15, 2008) (No. 2006AP2753).

the law with respect to a defendant's right to remain silent. Additional language further explaining the right to remain silent could have highlighted the missing testimony the jury thought important to its decision.[5] Dallas does not suggest what else should have been said. The trial court did not erroneously exercise its discretion in not providing new information when the instructions given were adequate. *See* ***State v. Simplot***, 180 Wis. 2d 383, 404-05, 509 N.W.2d 338 (Ct. App. 1993) (when the original instructions are legally sound and sufficient to satisfy the question posed by the jury it is proper to re-read the original instruction). It was proper for the trial court to refer the jury back to those instructions. *See* ***Hubbard***, 2008 WI 92, ¶57 (trial court judge "could have exercised his discretion by instructing the jury to re-read the jury instructions in their possession").

¶11 When a jury requests to review testimony "'the jury has a right to have that testimony read back to it, subject to the discretion of the trial judge to limit the reading.'" ***State v. Anderson***, 2006 WI 77, ¶83, 291 Wis. 2d 673, 717 N.W.2d 74 (quoted source omitted). The trial court's refusal to read testimony to the jury is reviewed for an erroneous exercise of discretion. ***Id.*** The trial court properly exercises it discretion when it applies the correct legal standard and uses a demonstrated rational process to reach a reasonable conclusion. *See* ***id.*** In deciding whether to fulfill the jury's request the court should consider "whether the evidence will aid the jury in the proper consideration of the case, whether the evidence could be subjected to improper use by the jury, whether a party will be unduly prejudiced if the jury is allowed to view the evidence again, and whether

[5] Trial counsel testified that she did not request further instruction in response to the three questions because she did not want to re-emphasize that Dallas did not testify.

the deliberations will be unduly extended by the circuit court's reading lengthy testimony." ***Id.***, ¶93.

¶12 The trial court expressed its concern that reading the entire cross-examination of the detective would unduly emphasize that testimony. It also observed that it was a very short trial (less than a day long) and the jury should have a fresh recollection of the testimony it heard earlier that day. It is not an erroneous exercise of discretion to place more weight on the risk of undue emphasis than other factors. Overemphasis of selected testimony is a legitimate concern. ***Id.***, ¶¶104-05. We conclude that based on the combination of the very short trial and the risk of overemphasis the trial court properly exercised its discretion in denying the jury's request to review the detective's cross-examination.

¶13 Even if the refusal to read the testimony to the jury was error, we are not persuaded that Dallas was prejudiced. "The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction. The conviction must be reversed unless the court is certain the error did not influence the jury." ***State v. Sullivan***, 216 Wis. 2d 768, 792, 576 N.W.2d 30 (1998) (citations omitted). Dallas merely summarizes the detective's testimony as touching on "central issues" in the case including the initial investigation of alternate suspects, the investigation at the crime scene, and the location of the beef jerky. He does not point to any particular portion of the cross-examination that would have influenced the jury to acquit. Indeed, at the postconviction motion hearing the trial court observed that on cross-examination the detective provided a solid and valid answer to the areas of inquiry suggesting some other perpetrator or explanation for Dallas's DNA being located at the scene. We are convinced that

the failure to read the detective's cross-examination to the jury did not contribute to the conviction.

By the Court.—Judgment and order affirmed.

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