COURT OF APPEALS
DECISION
DATED AND FILED

March 2, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP3217-CR **Cir. Ct. No. 2004CF72**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RANDALL L. FISHER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Door County: D.T. EHLERS, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Randall Fisher appeals a judgment convicting him of kidnapping, false imprisonment, first-degree sexual assault, possession of a dangerous weapon, and obstructing an officer, together with an order denying his motion for postconviction relief. Fisher argues (1) the court should have granted a

mistrial because of jury contamination, and (2) he received ineffective assistance of trial counsel. We affirm.

BACKGROUND

¶2 On May 26, 2004, Fisher woke his neighbor, Bailey B., in the early morning hours by pounding on her door. When she answered, Fisher displayed a stun gun and knife, handcuffed and gagged her, and brought her back to his basement. Fisher's wife, Sharon, found Fisher that morning naked in the basement with Bailey, who was topless and in handcuffs. Fisher had had sexual intercourse with Bailey. For the next two weeks, Fisher and Sharon held Bailey captive in a small boarded-up room in their basement and both repeatedly sexually assaulted her. On one occasion, they drove Bailey to her credit union and instructed her to close her account and give them the money. On multiple occasions during the two weeks, Fisher and Sharon told police investigating Bailey's whereabouts that they did not know where Bailey was.

¶3 Bailey escaped on June 10 and contacted police. Both Fisher and Sharon were charged with, among other things, kidnapping, false imprisonment, and sexual assault. Fisher's charges were tried to a jury from April 28 to May 4, 2006.

¶4 On the final day of the trial, the clerk of court, Nancy Robillard, reported an incident to the court that occurred the evening before with one of the jurors. Robillard stated that when juror Brenda Pink called her husband, he told her they had received a message on their home answering machine that said, "Brenda was good last night." Robillard said Pink was upset and asked Robillard if Fisher could have made the call. Robillard told Pink that was not possible because Fisher is in jail and could only make collect calls. Robillard said that

although there were other jurors in the room during her conversation with Pink, the two spoke in hushed tones and she thought that, at most, two or three other jurors may have heard their conversation.

¶5 Fisher moved for a mistrial, arguing other jurors may have improperly learned he was in custody and heard his name mentioned in connection with a call that visibly upset Pink. The court denied the motion, concluding the jury already had ample evidence Fisher was in custody. However, the court replaced Pink with an alternate juror and later instructed the jury that the issue of whether Fisher was in custody was irrelevant. The jury found Fisher guilty on all charges.

DISCUSSION

¶6 On appeal, Fisher again argues the court should have granted a mistrial because of jury contamination. When reviewing a circuit court's decision whether to grant a mistrial, we will reverse only if the court erroneously exercised its discretion. ***State v. DeLain***, 2004 WI App 79, ¶25, 272 Wis. 2d 356, 679 N.W.2d 562. Fisher also argues his trial counsel was ineffective for failing to emphasize certain aspects of his and Sharon's lifestyle. On this issue, we defer to the circuit court's findings of historical fact unless clearly erroneous, but review independently whether counsel's performance was deficient and prejudicial. ***State v. Trawitzki***, 2001 WI 77, ¶19, 244 Wis. 2d 523, 628 N.W.2d 801.

1. Mistrial

¶7 Fisher argues the circuit court should have granted a mistrial because other jurors may have learned from Robillard's conversation with Pink that Fisher was in custody.[1] We are reluctant to address the merits of this argument because Fisher fails to identify the legal standard for determining whether possible jury contamination requires a mistrial, fails to apply the facts to the standard,[2] and fails to refute the State's response to his argument.[3]

¶8 Nevertheless, we agree with the State's analysis of this issue. The State contends the legal standard is whether there is a reasonable probability the information Robillard shared with juror Pink prejudiced the jury. *See* ***State v. Broomfield***, 223 Wis. 2d 465, 477-78, 589 N.W.2d 225 (1999). It then argues

[1] Fisher also argues on appeal that the probability his name was associated with an upsetting phone call necessitated a mistrial. We do not address this argument because in addition to failing to identify any relevant legal standard, Fisher's argument on this issue is essentially rhetorical hyperbole not supported by the record. For example, he characterizes the message left on Pink's machine as "diabolical" and "tremendously threatening," and asserts that after such a call "no juror can … walk into the courtroom the next morning and be completely confident in their own safety." Fisher points to no evidence any jurors besides Pink were upset, much less affected, by the incident.

[2] Fisher simply states that jury tampering is presumptively prejudicial. There is no evidence here of jury tampering. The issue, as Fisher's trial counsel argued, is one of jury contamination.

[3] Fisher's only acknowledgement of the State's response misrepresents what he argued in his own opening brief and asserts an argument he is not permitted to make on appeal. In his reply, Fisher contends the State does not respond to his argument that "other jurors should have been questioned regarding what they overheard …." Fisher did not argue that in his opening brief—he argued that "further inquiry of the dialogue should have been made [of Pink and Robillard's conversation]." Either way, Fisher is raising issues not raised in the trial court. His trial counsel never argued either that others should be questioned or that the questioning of Pink and Robillard was inadequate. In fact, the record indicates both parties were permitted to question Pink and Robillard to their satisfaction. "Issues that are not preserved at the circuit court … generally will not be considered on appeal." ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727.

there was no reasonable probability of prejudice because the jury already knew Fisher spent a great deal of time in custody before the trial and the court cured any errors by replacing Pink and giving a cautionary instruction.

¶9 As the State points out, it is not clear other jurors learned anything they did not already know from the incident. First, Robillard said she and Pink spoke in hushed tones and that she thought "most of [the other jurors] never heard anything." However, even had other jurors heard Robillard tell Pink that Fisher was in custody, there was ample testimony at the trial Fisher spent a significant amount of time in jail prior to the trial. For example, when Sharon was asked to explain a letter Fisher sent to her, she exclaimed: "I don't know. We're incarcerated. We couldn't speak with each other face-to-face." Because the jury knew Fisher was in custody before the trial, additional prejudice from confirmation he was in fact in custody would have been nil to minimal.

¶10 Further, whether to grant a mistrial requires the court to exercise its discretion. *See* ***DeLain***, 272 Wis. 2d 356, ¶25. "Sound discretion includes considering alternatives such as a curative jury instruction." ***State v. Moeck***, 2005 WI 57, ¶72, 280 Wis. 2d 277, 695 N.W.2d 783. Here, the court replaced Pink with an alternate juror and gave a curative instruction after the incident. "Juries are presumed to follow the instructions given them …." ***State v. Johnston***, 184 Wis. 2d 794, 822, 518 N.W.2d 759 (1994). We conclude the court properly exercised its discretion when it employed these alternatives to granting a mistrial. In any event, as noted above, Fisher's argument is bereft of any reference to the standard for determining whether a mistrial was required and he fails to refute the State's argument. We will not develop an argument for him, *see* ***State v. West***, 179 Wis. 2d 182, 195-96, 507 N.W.2d 343 (Ct. App. 1993), *aff'd*, 185 Wis. 2d 68, 517 N.W.2d 482 (1994), and we deem unrefuted arguments conceded. *See*

Charolais Breeding Ranches, LTD v. FPC Secs. Corp., 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

2. Ineffective Assistance of Counsel

¶11 A claim of ineffective assistance of counsel requires a defendant to show his or her attorney's performance was both deficient and prejudicial. ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433. An attorney's performance is deficient if the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** (quoting ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)). An attorney's deficient performance is prejudicial if it "renders the result of the trial unreliable or the proceeding fundamentally unfair." ***State v. Damaske***, 212 Wis. 2d 169, 198, 567 N.W.2d 905 (Ct. App. 1997) (citation omitted).

¶12 Fisher's ineffective assistance argument essentially boils down to a broad and meritless attack on his trial counsel's strategy. First, Fisher argues his trial counsel failed to properly prepare Sharon as a witness. However, Sharon was the State's witness, not Fisher's. We agree with the State it is absurd to argue Fisher's counsel failed to adequately prepare an adverse witness.

¶13 Fisher also claims his counsel failed to adequately cross-examine witnesses. This is equally without merit. Fisher argues his attorney should have elicited, among other things, testimony that the Fishers purchased the handcuffs used on Bailey as a sex toy and the Fishers openly had sexual intercourse with

individuals other than each other.[4] Fisher contends this testimony would have helped the jury understand that Sharon seeing her husband naked with Bailey in handcuffs was a normal activity in the Fisher household, not necessarily nonconsensual sexual conduct.

¶14 We decline to second-guess Fisher's trial counsel's decision not to further develop testimony about the Fishers' sexual practices. Even assuming Fisher's theory of defense required evidence he and Sharon had an unorthodox sexual relationship, Sharon testified about their open marriage and the reason they owned handcuffs. Additional testimony on this matter would have been of minimal probative value and unnecessarily prejudicial. In any event, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."[5] ***Strickland***, 466 U.S. at 690. We therefore conclude Fisher has failed to show his attorney's performance was deficient.

¶15 Fisher also argues his counsel was ineffective for failing to point out alleged inconsistencies in the testimony of certain witnesses—such as the teller

[4] Fisher also argues his attorney should have elicited testimony that the Fishers regularly sheltered troubled individuals in their home and that they had "an unusual animosity toward law enforcement." Both arguments are without merit. First, Fisher's counsel testified that although he interviewed both Fisher and Sharon at length before the trial, neither told him they had previously sheltered troubled individuals. Even if there were merit to developing an argument about the Fishers' past relationships with troubled individuals—and we are not convinced there is—Fisher's counsel cannot be faulted for not eliciting information he had no reason to know. Second, Fisher does not explain how proof he disliked law enforcement would have helped his defense.

[5] Fisher also argues his trial counsel was ineffective for failing to call another witness who would have testified to substantially the same things he contends his counsel should have questioned Sharon about. We reject this argument for the same reason we conclude Fisher's counsel was not required to develop Sharon's testimony on these issues.

who waited on Bailey when the Fishers forced her to close her account—between Sharon's and Fisher's trials. Fisher's statement of facts includes a reference to the teller's testimony during his trial, but he nowhere tells us what exactly the teller said during Sharon's trial or indicates those statements have been made part of the record here. Nor does he provide record citations to the alleged inconsistencies of other witnesses' testimony. We decline to accept Fisher's unsupported characterization of witness testimony and we will not search the record to support his arguments.[6] *See* ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463.

By the Court.—Judgment and order affirmed.

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

[6] The State points out that portions of Fisher's argument on this issue also raise issues not raised at the circuit court and therefore should not be considered on appeal. *See* ***Huebner***, 235 Wis. 2d 486, ¶10.