COURT OF APPEALS
DECISION
DATED AND FILED

September 14, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2750-CR **Cir. Ct. No. 2007CF53**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID J. JENSEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Kewaunee County: DENNIS J. MLEZIVA, Judge. *Reversed and cause remanded with directions.*

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

¶1 PER CURIAM. David Jensen appeals from an amended judgment of conviction for one count of first-degree sexual assault of a child, and an order denying Jensen's motion for a new trial based on ineffective assistance. Jensen

asserts he is entitled to a new trial because the prosecutor compromised the jury's ability to fairly resolve the credibility dispute between Jensen and the victim by inquiring into the facts underlying Jensen's criminal history. We conclude Jensen's attorney was deficient for failing to object to this prejudicial examination and agree Jensen was denied effective assistance of counsel. Accordingly, we reverse and remand for a new trial.

BACKGROUND

¶2 On April 6, 2007, nine-year-old Brandi C. reported that her mother's boyfriend, David Jensen, had inappropriately touched her. Jensen was subsequently charged with first-degree sexual assault of a child. The one-day trial boiled down to a credibility dispute between Brandi, who testified unequivocally that Jensen sexually assaulted her, but whose recollection of the incident was less than clear, and Jensen, who denied the accusation.

¶3 As the State concluded its cross-examination of Jensen, the prosecutor stated he had "one last, final question," and asked whether Jensen had ever been convicted of a crime and, if so, how many times. As agreed to by the parties, Jensen answered seven. In a single question of redirect, defense counsel established that none of Jensen's seven convictions were for sexual assault. On recross, the prosecutor explored, without objection, not only the identity of Jensen's prior convictions, but also the facts underlying the incidents. This was the last testimony the jury heard before convicting him. The circuit court denied Jensen's postverdict motion for a new trial.

DISCUSSION

¶4 Allegations of ineffective assistance of counsel are governed by the two-part test articulated in ***Strickland v. Washington***, 466 U.S. 668 (1984). In order to establish that he was denied effective representation, Jensen must demonstrate both that counsel's performance was deficient and that counsel's errors or omissions were prejudicial to the defense. *See* ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). The performance and prejudice components are mixed questions of law and fact. ***Id.*** at 633-34. Under this standard, we will not reverse the circuit court's findings of fact unless they are clearly erroneous, but independently decide whether counsel's behavior was deficient and prejudicial. ***Id.***

¶5 Jensen proposes his counsel performed deficiently by failing to object to, or otherwise limit via a motion in limine, the scope of the prosecutor's questioning concerning Jensen's prior offenses. He does not dispute that the prosecutor appropriately established the number and nature of prior convictions to impeach Jensen pursuant to ***Nicholas v. State***, 49 Wis. 2d 683, 183 N.W.2d 11 (1971). However, he argues the prosecutor exceeded the permissible scope of recross by conducting an in-depth examination about the facts of Jensen's past offenses. As a result, the jury heard testimony that Jensen, among other things, struck both his ex-girlfriend and ex-wife, the latter while in the presence of their young son.

¶6 We first examine whether Jensen's counsel was deficient for failing to object based on ***Nicholas***. "The fact of prior convictions and the number thereof is relevant evidence because the law in Wisconsin presumes that one who has been convicted of a crime is less likely to be a truthful witness than one who

has not been convicted." ***Nicholas***, 49 Wis. 2d at 688; *see also* WIS. STAT. § 906.09.[1] The supreme court has, however, recognized that such evidence "has a great potential for abuse," in that the jury may impermissibly use it to infer that the defendant has a bad character or a propensity for criminality, and should be punished irrespective of the merits of the case. ***Nicholas***, 49 Wis. 2d at 688-89. "The likelihood of this reaction … is increased when the state is allowed to expatiate on the nature and details of the past crimes." ***Id.*** at 688. Consequently, the State may ask a witness only whether he or she has been convicted of a crime and, if so, how many times. ***Id.*** at 688-89.

¶7 In ***Nicholas***, our supreme court anticipated the possibility that some witnesses may answer those two questions falsely. If this occurs, a prosecutor is entitled to ask the witness whether he or she was convicted of a particular crime on a particular date, mentioning the crime by name if necessary for clarity's sake. ***Id.*** at 689. But a prosecutor is not permitted to delve into the facts of the past crimes. ***Id.*** at 691. ***State v. Hungerford***, 54 Wis. 2d 744, 748-49, 196 N.W.2d 647 (1972), reaffirmed the limited scope of rebuttal where a witness deviates from the script: "In such a case the inquiry is not limited to the fact of conviction, but the conviction(s) may be expressly mentioned by name."

¶8 ***Nicholas*** did not, however, address the present situation. ***Nicholas*** defines the scope of inquiry where a witness answers the two permissible questions incorrectly or claims a lack of memory. Our supreme court did not elucidate the scope of inquiry permitted when a witness chooses to inform the jury that none of his or her prior convictions involved the charged offense. "Deficient

[1] All references to the Wisconsin statutes are to the 2007-08 version unless otherwise noted.

performance is limited to situations where the law or duty is clear such that reasonable counsel should know enough to raise the issue." ***State v. Wery***, 2007 WI App 169, ¶17, 304 Wis. 2d 355, 737 N.W.2d 66. Jensen's attorney was presented with a different factual scenario than that addressed by existing case law. Counsel is not required to object and argue a point of law that is unsettled. ***State v. McMahon***, 186 Wis. 2d 68, 84, 519 N.W.2d 621 (Ct. App. 1994). Accordingly, we cannot conclude Jensen's counsel was deficient for failing to object based on ***Nicholas***.

¶9 But Jensen's counsel had grounds for objection other than ***Nicholas***. It is elementary that relevant evidence may nonetheless be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. WIS. STAT. § 904.03. WISCONSIN STAT. § 906.09, which generally permits a party attacking the credibility of a witness to introduce evidence that the witness has been convicted of a crime, explicitly adopts this basic rule. *See* WIS. STAT. § 906.09(2). The rule requires that the court determine the probative value of the evidence, and then assess whether the danger of unfair prejudice substantially outweighs that value.

¶10 Here, the defense attorney's failure to object deprived the circuit court of the opportunity to weigh the probative value of the evidence against the danger of unfair prejudice. The prosecutor's foray into the facts underlying Jensen's criminal history was probative of Jensen's credibility to the extent it demonstrated he had previously been convicted of a crime. By contrast, the evidence was extremely prejudicial. The last exchange the jury heard painted Jensen as a violent, physically abusive individual. After establishing his first conviction was for battery and disorderly conduct, the prosecutor elicited Jensen's testimony that he hit a person whose identity he could not recall. In response to

the prosecutor's instruction to "tell about the facts of that case," Jensen testified that he beat an acquaintance who jumped Jensen's brother in a parking lot. Jensen stated he was convicted of battery a second time after he "grabbed [his ex-girlfriend] by the throat and gave her a shove to get away because she hit me in the head with a frying pan." Jensen could not recall the details of the third, fourth, or fifth convictions, leading the prosecutor to speculate that Jensen may have been convicted of sex crimes but simply could not recall them. An incident in which Jensen elbowed his ex-wife in the ribs formed the basis for his sixth and seventh convictions. Although this evidence was elicited for the limited purpose of impeachment, it invited the jury to conclude Jensen deserved punishment merely because he was a bad person.

¶11 The unfairly prejudicial nature of the evidence clearly and substantially outweighed its probative value. Under these circumstances, trial counsel had a clear duty to object under WIS. STAT. §§ 904.03 and 906.09(2). We have no trouble concluding counsel's failure to do so fell "outside the wide range of professionally competent assistance." *See* ***Pitsch***, 124 Wis. 2d at 637.

¶12 We next consider whether Jensen was prejudiced by trial counsel's deficient performance. This prong of the ***Strickland*** analysis asks whether the defendant has shown a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. *See* ***Strickland***, 466 U.S. at 694. This is not, however, an outcome determinative standard. ***State v. Johnson***, 133 Wis. 2d 207, 217, 222, 395 N.W.2d 176 (1986). While it is not enough for the defendant to show that counsel's errors had some conceivable effect on the outcome of the proceedings, neither must the defendant show that trial counsel's conduct more likely than not altered the outcome of the

case. ***Id.*** at 222. Rather, a reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Id.*** at 222-23.

¶13 Because the State introduced no physical evidence to support its allegations, the sole issue was which witness, Brandi or Jensen, was credible. The jury's ability to fairly weigh the conflicting testimony was tainted by the prosecutor's impermissible inquiry into the facts underlying Jensen's prior criminal history.[2] This examination spans a full five pages of the trial transcript and was the last testimony the jury heard. Trial counsel's failure to object to the inquiries into Jensen's past criminal history significantly damaged Jensen's credibility. "Because credibility was the central issue in this case, we conclude that the error had a pervasive effect on the inferences to be drawn from the evidence and altered the entire evidentiary picture." ***Pitsch***, 124 Wis. 2d at 646 (quotation omitted).

By the Court.—Judgment and order reversed and cause remanded with directions.

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

[2] For this reason, we doubt the real credibility controversy was fully tried, and would exercise our discretionary reversal authority even if Jensen had received effective assistance of counsel. *See* WIS. STAT. § 752.35.