

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 22, 2011

A. John Voelker
Acting 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. 2009AP956-CR

Cir. Ct. No. 2007CF4362

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONOVAN M. BURRIS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM SOSNAY AND DENNIS R. CIMPL, Judges.
Affirmed.

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

¶1 KESSLER, J. Donovan M. Burris appeals from a judgment of conviction for first-degree reckless injury while armed and being a felon in possession of a firearm, and from an order denying his motion for postconviction

relief. Burris's appeal is before us on remand from the supreme court. On Burris's initial appeal, we reversed Burris's conviction and remanded for a new trial. *See State v. Burris*, No. 2009AP956-CR, unpublished slip op. (WI App Jan. 26, 2010) ("*Burris I*").¹ We concluded that there was a reasonable likelihood that the trial court's answers to specific questions from the jury could have led the jury to misapply the jury instructions. *Id.*, ¶32. During deliberations, the jury submitted written questions asking whether it could consider Burris's conduct after he shot Kamal Rashada in analyzing the utter disregard element of the first-degree reckless injury charge. *Id.*, ¶18. In answering the jury's questions, the trial court quoted language from *State v. Jensen*, 2000 WI 84, 236 Wis. 2d 521, 613 N.W.2d 170. We concluded that the trial court's response could have led the jurors to apply potentially confusing jury instructions. *See Burris I*, No. 2009AP956-CR, unpublished slip op., ¶33. The supreme court reversed our initial decision and remanded the matter to this court with instructions to consider issues initially briefed, but not considered in our original decision. *See State v. Burris*, 2011 WI 32, ¶67, 333 Wis. 2d 87, 797 N.W.2d 430 ("*Burris II*").

¶2 We now consider Burris's remaining appellate arguments. Specifically, Burris argues that: (1) the trial court erred when it allowed the State to cross-examine him on an irrelevant issue and then also allowed the State to present extrinsic evidence, in the form of a rebuttal witness, on that issue; (2) his trial counsel provided ineffective assistance by: (a) eliciting inadmissible other acts testimony from Cathy Rashada, the victim's mother, (b) failing to request a curative jury instruction concerning that testimony, and (c) failing to object to portions of the State's closing arguments, which Burris contends were

¹ The Honorable Ralph Adam Fine dissented in our original decision.

inappropriate; and² (3) he is entitled to a new trial in the interest of justice. We disagree and affirm the trial court.

BACKGROUND

¶3 The events leading up to Burris's conviction were discussed in detail in our initial opinion; however, we will repeat some of the facts in order to provide a background for the issues currently before us. On the afternoon of September 5, 2007, Burris went to the home of Cathy Rashada to visit the two children he had with Cathy's daughter, Khadijah Rashada. It is undisputed that Burris went to the home with a loaded gun. Cathy, Khadijah, the two children, and Cathy's son, Kamal, were all home at the time of Burris's visit. Shortly after Burris arrived, he and Khadijah argued. Ultimately, a shot was fired from Burris's gun, striking Kamal in the neck. The shot left Kamal paralyzed. Burris fled the Rashadas' residence shortly after the shooting and was arrested five months later, when he turned himself in. Burris was charged with first-degree reckless injury while armed and with being a felon in possession of a firearm.

¶4 The events leading up to Kamal's shooting are disputed. At trial, the State called Cathy, Khadijah and Kamal to testify. Cathy and Kamal testified that while Burris and Khadijah were arguing, Kamal "touched" or "tapped" Burris on the arm in an attempt to get him to leave the home, at which point Burris turned around and shot Kamal in the neck. Khadijah testified that Burris initially pointed the gun at her, but after being told to leave by Kamal, raised the gun to Kamal and shot him in the neck.

² Burris also argues that his trial counsel was ineffective for inadequately objecting to the trial court's proposed answer to the jury's questions. Because the supreme court concluded that the trial court's response was not an erroneous exercise of discretion, we do not address this argument. See *State v. Burris*, 2011 WI 32, 333 Wis. 2d 87, 797 N.W.2d 430 ("*Burris II*").

¶5 Throughout the course of the trial, Burris and his counsel maintained that the shooting was accidental. Burris testified that he brought a loaded gun with him that day because he was being threatened by Cathy's neighbors and was in need of protection. He further testified that while he and Khadijah were arguing, Kamal came at him "at a rapid speed" and grabbed Burris's wrist, causing Burris to accidentally hit the gun's trigger and strike Kamal in the neck. Cathy, Khadijah, Kamal and Burris all testified that Burris expressed immediate remorse after the shooting. Khadijah also testified that after the shooting, Burris pleaded with Kamal not to die, aimed the gun at his own head, and told Cathy to kill him. It is undisputed that Burris then fled the Rashadas' residence.

¶6 The jury returned a guilty verdict as to both charges. Burris filed a postconviction motion arguing trial court error and several instances of trial counsel ineffectiveness. The trial court denied the motion. This appeal follows. Additional facts pertaining to Burris's arguments are discussed as relevant to the discussion.

DISCUSSION

I. The State's Cross-Examination and Rebuttal Witness.

¶7 At trial, Burris testified about the gun used to shoot Kamal. Burris testified that he entered the Rashadas' residence with a loaded gun in his waistline but that he went to put it under a mattress immediately because he did not want his children to see it. Burris stated that he brought the gun with him for protection because he felt threatened by Cathy's neighbors, who Burris claims fired shots at him following a car accident. Burris also admitted that the gun did not have a safety and had a hair-trigger.

¶8 On cross-examination, the State questioned Burris about where he obtained the gun. Defense counsel objected; however, after the trial court overruled the objection, Burris answered, “[a] friend of mine.” Burris stated that he did not know his friend’s first or last name, but that the friend went by the street name “Black.” The State asked Burris multiple questions about “Black,” and defense counsel objected multiple times to the State’s line of questioning, arguing that the questions were irrelevant. The trial court overruled the objections, finding that the line of questioning was relevant to Burris’s credibility. After Burris’s testimony was completed, the State called Kamal as a rebuttal witness. Kamal testified that “Black” was a street name used by Burris. Defense counsel did not object.

¶9 Burris contends that the State’s line of questioning pertaining to where he obtained the gun was irrelevant and that the admission of Kamal’s rebuttal testimony was erroneous because it was extrinsic evidence of specific conduct used to challenge Burris’s credibility, contrary to WIS. STAT. § 908.08(2) (2009-10).³ He is mistaken.

¶10 “The extent and scope of cross-examination allowed for impeachment purposes is a matter within the sound discretion of the trial court.” *State v. Ross*, 2003 WI App 27, ¶43, 260 Wis. 2d 291, 659 N.W.2d 122. “If a trial court applies the proper law to the established facts [when making an evidentiary ruling], we will not find a misuse of discretion if there is any reasonable basis for the trial court’s ruling.” *State v. Meehan*, 2001 WI App 119, ¶23, 244 Wis. 2d 121, 630 N.W.2d 722.

³ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶11 The trial court reasonably found that the State's questions were relevant to Burris's credibility. Burris claimed that arming himself was necessary because he felt threatened in the Rashadas' neighborhood. This line of questioning was relevant to the credibility of Burris's explanation for why he had the gun. This case hinged on witness credibility because of the different accounts of the shooting presented by Burris and the Rashadas. The trial court reasonably exercised its discretion in allowing the State to question Burris about the gun used to shoot Kamal.

¶12 Burris's defense counsel did not object to the State calling Kamal as a rebuttal witness. This issue is therefore waived for appellate review. *See* WIS. STAT. §§ 906.08(2) & 901.03(1). However, even if Burris objected to Kamal's rebuttal testimony, Burris's argument would still fail. WISCONSIN STAT. § 906.08(2) provides that "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than a conviction of a crime or an adjudication of delinquency as provided in s. 906.09, may not be proved by extrinsic evidence." *Id.* Testimony pertaining to Burris's street name is not testimony pertaining to a specific instance of Burris's conduct; rather, it is evidence of how Burris was known by others in the community. Thus, the jury could properly consider whether Burris had actually suggested that he acquired the gun from himself.

II. Ineffective Assistance of Counsel.

¶13 To prevail on an ineffective assistance of counsel claim, the defendant must show that counsel's action or inaction constituted deficient performance and that the deficiency prejudiced the defense. *See State v. Love*, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. In determining whether

defense counsel's performance was deficient, a reviewing court must engage in a "highly deferential" review of counsel's performance. *See Strickland v. Washington*, 466 U.S. 668, 689 (1984). A reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* With respect to the prejudice component, a defendant must affirmatively show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* We need not address both components if a party makes an insufficient showing as to one. *See id.* at 697.

A. *Other Acts Testimony*

¶14 Burris contends that trial counsel was ineffective for eliciting inadmissible other acts testimony from Cathy and for failing to properly request a curative instruction concerning her testimony.

¶15 At trial, the State asked Cathy whether Burris had "ever brought a gun to your residence and threatened to shoot you before or anything like that?" Cathy responded "[n]o." During cross-examination, the following exchange took place between Burris's trial counsel and Cathy:

[Burris's trial counsel]: ... you said you saw [Burris] walk out of the bedroom carrying the gun; is that right?

[Cathy]: Yes.

....

[Burris's trial counsel]: And you testified that – you testified that you hadn't ever seen him bring a gun, carrying a gun before?

[Cathy]: Yes, I saw him carrying a gun before.

[Burriss's trial counsel]: You saw him carrying a gun before?

[Cathy]: Yes.

[Burriss's trial counsel]: And this was times where he brought the gun into the apartment?

[Cathy]: No.

[Burriss's trial counsel]: Okay. So you saw him carrying a gun somewhere else?

[Cathy]: Yes, at another resident he stay at. He – he threatened my daughter with a gun before, but once the police had came, I don't know what he did with it.

[Burriss's trial counsel]: Okay. We're talking about this today–

[Cathy]: No.

[Burriss's trial counsel]: -- this particular day. Okay. And you hadn't seen him carry a gun[?]

¶16 Burriss argues that “[t]rial counsel should have known that pursuing this line of questioning with a hostile witness could lead to a response that would be prejudicial to Burriss.” Burriss’s defense counsel was not ineffective for pursuing a line of questioning that was helpful to Burriss and originated with the State. Burriss’s trial counsel attempted to elaborate on Cathy’s testimony that she had not seen Burriss previously bring a gun to her residence, threaten to shoot her, or “anything like that.” That counsel received an unprompted, damaging response about an alleged previous threat does not make the strategic decision to emphasize helpful testimony deficient performance. “We will not second guess trial counsel’s selection of trial tactics or strategies in the face of alternatives that he or she has considered.” *State v. Nielsen*, 2001 WI App 192, ¶44, 247 Wis. 2d 466, 634 N.W.2d 325. “Rather, we ‘judge the reasonableness of counsel’s challenged

conduct on the facts of the particular case, viewed as of the time of counsel's conduct.” *Id.* (citation omitted).

B. Rejecting a curative instruction

¶17 Burris's trial counsel moved for a mistrial the day after Cathy testified, stating:

... In regards to testimony right at the end of the day that Cathy Rashada gave, she – in a nonresponsive answer to one of my questions, she volunteered that she had believed or had knowledge of Mr. Burris threatening Khadijah with a gun at some earlier time, other acts type of evidence, and that certainly would move for a mistrial based on what she said.

....

... I certainly did not ask that question of her and she volunteered that as sort of an extension of whatever else I had asked at the time.

¶18 The trial court denied the motion, but indicated that it would consider giving an instruction to the jurors advising them to disregard the testimony. Burris's trial counsel declined the offer, stating that he preferred the trial court include a general instruction about other acts evidence rather than “highlight some specific thing she said again.” This was a reasonable strategic decision. *See Nielsen*, 247 Wis. 2d 466, ¶44. Trial counsel's decision not to accept a curative instruction was a sound trial strategy because he did not wish to remind the jurors of Cathy's negative testimony.

C. Prosecutor's Closing Argument

¶19 Burris also contends that his trial counsel was ineffective for failing to object to portions of the State's closing argument in which the State discussed its decision not to charge Burris with an intentional crime and suggested that

Burriss benefited from that decision. The State made the following comments during its closing argument:

Sometimes it's important to keep in mind what hasn't been charged and what's not being prosecuted and what's not being argued about. Let's just start with that proposition so we can talk about what we have before us. This defendant has never been charged with attempted murder or what the State of Wisconsin calls technically attempt[ed] intentional homicide. Nobody has ever charged him with that....

¶20 The State then argued that after Burriss expressed immediate remorse for the shooting, he:

[a]nnounces to one of those witnesses before he leaves, I can't go to jail, I'm out of here. And he takes his gun and he runs and he runs and he runs about – for five months before he comes back with his story that he wants you to believe and he wants you to somehow give him credit or benefit for that – give him some more benefit than whatever he's already been given by not being charged with an intentional crime.

I don't think you should do that obviously.

¶21 Burriss argues that the State should not have been permitted to discuss his not being charged with an intentional crime because the State's charging decision was not part of the evidence presented to the jury. The State responds that Burriss repeatedly argued throughout the trial that Kamal's shooting was unintentional, making it necessary for the State to differentiate between the elements of an intentional crime (first-degree intentional homicide) and the charge against Burriss of first-degree reckless injury. We agree.

¶22 Throughout the trial, Burriss's defense was that the shooting was accidental. Burriss testified that as he was attempting to leave the Rashadas' residence, he saw Kamal "advancing towards [him] at a rapid speed." Burriss also testified that Kamal grabbed Burriss's wrist and as Burriss attempted to release

himself from Kamal's grip, the gun accidentally discharged. Burris referred to the incident as a "freak accident" and testified that before turning himself in, he tried to "plead [his] innocence" to Camilla Rashada, Kamal and Khadijah's sister, saying "I didn't mean to do it." He further testified that if he "blatantly put the gun to this man's neck ... the results should have been fatal," and that he "never intentionally shot this man." Burris thus injected the question of intent into a case that did not depend on his intent.

¶23 The State's comments during closing argument were in response to Burris's theory of defense. In the context of the entire closing argument, it is clear that the State was not suggesting that the jury convict Burris simply because he was not charged with an intentional crime, but rather was attempting to clarify the difference between an intentional crime (with which Burris was not charged) and a reckless crime (with which Burris was charged). The State's comments were meant to inform the jury that Burris's intention was irrelevant to his liability for a reckless crime. *See State v. Wolff*, 171 Wis. 2d 161, 169, 491 N.W.2d 498 (Ct. App. 1992) (In discussing prosecutor misconduct, we noted "where the argument of the defense 'clearly invited and provoked the remark of the prosecutor ... the appellant cannot complain because his argument backfired.'") (citation omitted).

¶24 The trial court informed the jury that the opinions, arguments and conclusions argued by both parties in closing arguments are not evidence, and it instructed the jury to draw its own conclusions based on the evidence and reasonable inferences from that evidence. We assume the jury followed the instructions of the trial court. *See Nowatske v. Osterloh*, 198 Wis. 2d 419, 448, 543 N.W.2d 265 (1996). Burris's trial counsel was not deficient for failing to object to an argument that was not objectionable. *See State v. Toliver*, 187 Wis.

2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (An attorney does not perform deficiently by failing to make a meritless argument.).

III. Interest of Justice Reversal.

¶25 “Under WIS. STAT. § 752.35, we may order a new trial if it appears from the [r]ecord that: (1) ‘the real controversy has not been fully tried’; or (2) ‘it is probable that justice has for any reason miscarried.’” *State v. Harrell*, 2010 WI App 132, ¶24, 329 Wis. 2d 480, 791 N.W.2d 677 (citation omitted). “This discretionary reversal, however, is reserved for ‘exceptional cases.’” *Id.* (citation omitted). In reviewing all of Burris’s claims of error, we are unable to conclude that any or all of them warrant a new trial in the interest of justice. The trial court did not erroneously allow the State to cross-examine Burris on the issue of where he obtained the gun used to shoot Kamal, nor did the trial court erroneously admit Kamal’s rebuttal testimony as to Burris’s nickname. Burris’s trial counsel was also not ineffective.

CONCLUSION

¶26 For the foregoing reasons, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

