**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**November 5, 2014**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2013AP2132-CR** **Cir. Ct. No. 2012CF428**

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

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**RICHARD R. LISKO,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Fond du Lac County: GARY R. SHARPE, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. Richard Lisko appeals from a judgment convicting him of false imprisonment and first-degree reckless injury. He argues that he was

convicted on insufficient evidence, that prosecutorial misconduct deprived him of a fair trial, and that the trial court erroneously failed to give the *falsus in uno* jury instruction and to strike a particular juror for cause. We disagree and affirm.

¶2 Fond du Lac sheriff's deputy Pete Vergos responded to a report of a burglary in progress at Lisko's home. Vergos arrived to find Lisko, Joel Kennedy, Sr. (Kennedy), Kennedy's eighteen-year-old son, Joel Kennedy, Jr. (Joel or Joey), and Lisko's neighbor, Henry Haack, on Lisko's porch. Vergos observed that Joel was bleeding about his face, head, and ears. Lisko said his dog Bubba attacked Joel as he was breaking in. When Joel said that was true, Vergos searched and handcuffed him and put him in the squad car. The search yielded no burglarious tools, drugs, or anything suspicious.

¶3 In the squad Joel told Vergos a different story. He said he and his father were invited to Lisko's for the weekend, that shortly after their arrival, Lisko began accusing him of past break-ins, thefts, and property damage, which Joel denied. He punched Joel, knocked him to the floor, kicked him, then commanded Bubba to attack him. Over the next hour or so, Lisko bound Joel's ankles with a leather leash, dragged him outside, tied his feet to a post on the porch, and later, assisted by Kennedy, hoisted him up by his ankles and left him suspended from a porch rafter. Throughout this time, Lisko periodically commanded Bubba to attack him. Lisko freed Joel only when Haack arrived and demanded that Joel be cut down. When confronted, Lisko told Vergos he tied up Joel so he would not run away and to get to the bottom of the recent spate of thefts. Vergos released Joel from custody and called an ambulance.

¶4 Lisko was charged with false imprisonment and first-degree reckless injury.[1] At his jury trial, Lisko asserted that his reasonable belief that Joel had burglarized his home justified the "citizen's arrest" and the manner and length of detention. When the State rested, Lisko moved to dismiss the reckless injury charge on grounds that it had not proved that he caused Joel great bodily harm. The court denied his motion, the jury found him guilty, and he appeals.

*Sufficiency of the Evidence*

¶5 A jury's verdict must not be reversed for insufficient evidence "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Whether the evidence is sufficient to sustain the jury's verdict is a question of law. ***State v. Booker***, 2006 WI 79, ¶12, 292 Wis. 2d 43, 717 N.W.2d 676.

¶6 To convict Lisko of first-degree reckless injury the jury had to be convinced beyond a reasonable doubt that he caused Joel great bodily harm by criminally reckless conduct, the circumstances of which displayed an utter disregard for human life. WIS. STAT. § 940.23(1)(a) (2011-12),[2] WIS JI—CRIMINAL 1250. Criminally reckless conduct requires the creation of an objectively unreasonable and substantial risk of death or great bodily harm and a

[1] Kennedy was charged as party to a crime and was tried separately. *See* Fond du Lac county case no. 12-CF-427.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless noted.

subjective awareness of that risk. ***State v. Blair***, 164 Wis. 2d 64, 70, 473 N.W.2d 566 (Ct. App. 1991).

¶7 Lisko first argues that the evidence was insufficient to show that he caused Joel great bodily harm. "'Great bodily harm' means bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury." WIS. STAT. § 939.22(14).

¶8 Joel testified consistent with the facts stated above, including that Lisko commanded Bubba to bite him "over and over and over," even stuffing inside Joel's shirt a chew bone and gloves used to rile up the dog and that being hung upside down was "really painful." He also said that Lisko threatened that he next was going to tie a cement block to his feet and throw him into a nearby pond.

¶9 Joel presented at the emergency room with puncture wounds and lacerations on his face, neck, ears, scalp, and abdomen, a swollen eye, and ligature marks on his ankles. According to the complaint, Vergos observed Joel's treatment and his wounds were not sutured due to the risk of infection. E.R. physician Dr. Ann Marie Cappellari testified that Joel's ligature marks were consistent with being trussed with the leash, that compression from a ligature can cause nerve damage, as can the weight of hanging, and that nerve damage results in "paresthesia," or numbness. Cappellari opined that numbness that persists for a period of time constitutes a protracted loss or impairment of the function of a bodily member.

¶10 Joel's pediatrician, Dr. Habatollah Ashraf, examined Joel about three weeks later. He noted that Joel was suffering numbness to his lower leg and

referred him to a neurologist. Ashraf opined that numbness could be considered a protracted impairment of the function of a bodily member. Joel testified that the numbness lasted four or five months.

¶11 The jury was entitled to accept these witnesses' testimonies over Kennedy's testimony, for example, that Joel suffered worse injuries in accidents involving his bike or skateboard, or that of Kennedy's boss who said he noticed no obvious injuries when he saw Joel a few days later. The credibility and weight to be given testimony regarding a victim's injuries for purposes of establishing great bodily harm is for the jury. ***Flores v. State***, 76 Wis. 2d 50, 60, 250 N.W.2d 720 (1977), *overruled on other grounds by* ***State v. Richards***, 123 Wis. 2d 1, 365 N.W.2d 7 (1985).

¶12 Lisko likewise contends the State failed to prove that he acted with "utter disregard for human life." This argument fares no better.

¶13 A person acting with utter disregard for human life must possess "a state of mind which has no regard for the moral or social duties of a human being." ***State v. Miller***, 2009 WI App 111, ¶33, 320 Wis. 2d 724, 772 N.W.2d 188 (citation omitted). It is proved by examining the acts that caused the injury and the totality of the circumstances surrounding them, including the type and nature of the conduct, why the perpetrator acted as he or she did, the extent of the victim's injuries and the degree of force required to cause them, the type of victim, his or her age, vulnerability, fragility, and relationship to the perpetrator, and whether the totality of the circumstances showed any regard for the victim's life. ***Id.***, ¶34.

¶14 Bubba is a fifty-to-sixty-pound mastiff/pit bull mix. Joel is 5'6" and weighs 130 pounds. Cappellari testified that the dog bites to the neck could have

punctured Joel's windpipe or carotid arteries. Short of death, a carotid artery bleed would compromise blood flow to the brain, causing a stroke and permanent damage. Nerves also could have been severed or damaged.

¶15 Lisko had to be aware that repeatedly siccing Bubba on Joel created an objectively unreasonable and substantial risk of death. He could see Joel's bloodied face, ears, neck, and head. Still, he ratcheted up his conduct and suspended Joel by his ankles for a sustained period of time, left him unattended, and went inside the house to smoke pot. Although at some point Lisko put a stump nearby for Joel to push down on to relieve the tension on his ankles, Joel testified that he was too weak to do it for long. It was for the jury to decide if Lisko's act was a mitigating factor or a recognition of Joel's torment and a choice to continue it. Likewise, that Lisko, as he soft-pedals it, "untied [Joel] from the post" does not necessarily prove that he lacked utter disregard for life. He did so only upon Haack's arrival and only at Haack's insistence. The jury was entitled to conclude that Lisko's overall conduct showed "no regard for the moral or social duties of a human being."

*Alleged Prosecutorial Misconduct*

¶16 Lisko argues that multiple acts of prosecutorial misconduct deprived him of his right to a fair trial. Whether prosecutorial misconduct occurred and whether such conduct requires a new trial is left to the discretion of the trial court. ***State v. Bembenek***, 111 Wis. 2d 617, 634, 331 N.W.2d 616 (Ct. App. 1983). Reversal on this basis is drastic and should be approached with caution. ***State v. Lettice***, 205 Wis. 2d 347, 352, 556 N.W.2d 376 (Ct. App. 1996). Prosecutorial misconduct violates due process if it "poisons the entire atmosphere of the trial."

***Id.*** (citation omitted). It is the defendant's burden to establish that it occurred. ***State v. Harrell***, 85 Wis. 2d 331, 337, 270 N.W.2d 428 (Ct. App. 1978).

¶17 Lisko contends prosecutor Dennis Krueger engaged in "espionage" to obtain the work product of defense counsel Daniel Stevens. The complaint indicates that Vergos heard Lisko using specific German commands to Bubba who was "very obedient." Stevens thus sought to engage dog trainer Angela Fink as an expert witness. After some discussions with Stevens, Fink contacted Krueger and the lead detective and said she believed Stevens wanted her to lie at trial and testify that Bubba attacked Joel on his own, not in response to Lisko's commands. The detective recorded a telephone call from Fink to Stevens without Stevens's knowledge. The detective testified that the conversation would not support a claim that Stevens told Fink to lie.

¶18 Lisko moved to dismiss the charges against him on the basis that the prosecution's contact with Fink and one-party consent recording violated the attorney work-product privilege because it revealed Stevens's strategies, mental impressions and the defense theory that Bubba attacked unprompted. The trial court concluded that Fink's concern should have been investigated by an independent agency, not the detective and prosecutor involved in Lisko's case. Reasoning, however, that the essence of what Fink was to consider as a potential defense expert was whether Bubba was capable of responding to a specific word that meant to attack and/or bite, the court ordered the following limited sanction:

> [I]t is ordered that neither the prosecution nor the defense can ask nor can any witness from either side testify that the defendant's dog, Bubba, bit the victim, Joel Kennedy, as the result of a direct, formal, verbal command, such as a specific German term, from the defendant. This order does not prohibit testimony regarding general oral encouragement or other nonverbal signals by the defendant.

The court also explained to Joel that "there is not to be any testimony about Mr. Lisko giving like an oral German command, and, as a consequence of that command, the dog bit you." Joel confirmed that he understood.

¶19 We conclude the order was an appropriate and sufficient remedy. The work-product privilege is not a right of constitutional dimension. ***State v. Revels***, 221 Wis. 2d 315, 326-27, nn.6-7, 585 N.W.2d 602 (Ct. App. 1998). Krueger's unsolicited contact by Fink and the follow-up recording that revealed no improper instruction by Stevens did not poison the entire atmosphere of the trial.

¶20 Lisko next argues that Krueger repeatedly violated the above order. He complains, for example, that during opening statements Krueger told the jury that shortly after the Kennedys arrived at Lisko's house, Lisko "punched [Joel] in the face, knocked him down to the ground, and then gave his dog a command and had the dog bite Joey as he is lying on the ground curled up in a ball. And the dog did stop at [Lisko's] command." Lisko also contends Krueger coached Joel to testify at trial that Lisko said or did things that caused Bubba to bite him, such as in the following exchange between Krueger and Joel:

> Q You said that you didn't think that the dog did this on its own, yes or no?
>
> A Yes.
>
> Q You heard the defendant say something?
>
> A Yes.
>
> Q And it was after that that the dog started biting you?
>
> A Yes.
>
> ….
>
> A [Lisko's angry questioning about past break-ins] went on for about five minutes and then he sent the

dog in over repeatedly by me, over and over and over, over on my head.

Q You said he sent the dog in to bite you….

A Yes.

….

Q Okay. But before that you said he sent the dog in to bite?

A Yes.

Q So the dog came; right?

A Yes.

Q Did you—listen carefully to my question—see or hear Mr. Lisko do anything before you felt the dog start biting you? Please answer that question "yes" or "no."

A Yes.

Q Okay. So something happened; right?

A Yes.

Q Something that Mr. Lisko did?

A Yes.

Q And that's when the dog started biting you?

A Yes.

Q Did it appear to you from what you saw or heard that the dog was, what, biting you because of something that Mr. Lisko said or did?

A Yes.

¶21 Both times, Lisko moved unsuccessfully for a mistrial.[3] A ruling on a mistrial motion is reviewed for an erroneous exercise of discretion. ***State v. Patterson***, 2009 WI App 161, ¶33, 321 Wis. 2d 752, 776 N.W.2d 602. "The trial court must determine, in light of the whole proceeding, whether the claimed error [is] sufficiently prejudicial to warrant a new trial." ***State v. Pankow***, 144 Wis. 2d 23, 47, 422 N.W.2d 913 (Ct. App. 1988). The denial of the motion will be reversed only upon a clear showing of an erroneous exercise of discretion. ***Id.***

¶22 Stevens himself had told the jury in his own opening statement that Lisko "gives the dog this command in German because he has trained the dog in German command." The court ruled that neither party violated the order because, as to Krueger, giving "a command" is not specific and, as to both, opening statements are not testimony or evidence. The court also denied the mid-trial mistrial motion, finding there was no testimony about a specific German command and reiterating the parameters of the limited sanction order. We see no misuse of discretion in denying the mistrial motions.[4]

¶23 Lisko next asserts that the State failed to disclose exculpatory evidence that would have altered the jury's verdict on first-degree reckless injury. The suppression by the prosecution of evidence favorable to an accused that is material to guilt or punishment violates due process. ***State v. Rockette***, 2006 WI App 103, ¶39, 294 Wis. 2d 611, 718 N.W.2d 269. Evidence is material if it

[3] The court already had declared a mistrial during voir dire because Stevens asked potential jurors whether knowing Lisko was in custody would bias them against him.

[4] Lisko moved for yet another mistrial after the jury returned its guilty verdicts based on comments in the State's closing argument. That untimely objection is waived. *See* ***State v. Rockette***, 2006 WI App 103, ¶28, 294 Wis. 2d 611, 718 N.W.2d 269.

probably would have changed the outcome of the trial. ***State v. O'Brien***, 223 Wis. 2d 303, 320-21 & n.11, 588 N.W.2d 8 (1999). Our review is de novo. *See* ***Rockette***, 294 Wis. 2d 611, ¶39.

¶24 Joel and an adult male were involved in a physical altercation three days before the incident at Lisko's. After Joel allegedly drew a knife on some boys in a Waukesha county park, the father of one of them knocked Joel off his bike, put his hands around Joel's neck, and pushed his face into the ground. The complaint indicated that a police officer noted "fresh injuries" to Joel's face, neck, and one knee. Lisko asserts that Krueger, who used to be an assistant district attorney in Waukesha county, "likely" knew about that incident and somehow contrived to have the filing of disorderly conduct charges against Joel delayed until the day before Lisko's trial began. Lisko contends that if the jury had known of that incident, there is a reasonable probability it would not have found that he caused Joel great bodily injury.

¶25 The trial court disagreed, as do we. It found that Joel had made reference at trial to falling off of his bike, the conclusions Lisko's counsel drew about Krueger's complicity were based on innuendo, and any late disclosure at worst was harmless error because whatever undescribed injuries Joel suffered in the Waukesha county event played no part in the jury's determination that Joel suffered protracted numbness from being suspended by his ankles.

¶26 The last aspect of Lisko's claim of prosecutorial misconduct is that Krueger knowingly presented materially false evidence to the jury to obtain a conviction. If true, it would violate Lisko's right to due process and warrant a new trial if there was any reasonable likelihood that the evidence affected the judgment of the jury. *See* ***State v. Nerison***, 136 Wis. 2d 37, 54, 401 N.W.2d 1 (1987).

¶27 Lisko alleges that Krueger knew that Joel presented false evidence at least five points: (1) denying heroin use despite testifying at his father's trial that he used it; (2) denying burglarizing Lisko's home despite admitting to it the night of the incident;[5] (3) testifying on direct that when he first walked into Lisko's house, Bubba leaped up and snapped in front of his face in response to a hand signal from Lisko despite telling police that Bubba licked his face; (4) testifying he did not have a swollen eye when he arrived at Lisko's and that it was "[p]robably from the dog," or that Lisko "might have" punched him, despite having told police in the Waukesha county incident that the boy's father had "proceeded to beat his face in"[6]; and (5) blaming the cuts on his legs from having fallen off his bike when he actually was pushed off it.

¶28 Joel's testimony was impeached where it was inconsistent with his prior testimony or statements. The jury decides issues of credibility and resolves conflicts in the testimony. ***Poellinger***, 153 Wis. 2d at 506. Further, offering a witness whose testimony is inconsistent should not be confused with eliciting perjured testimony. *See* ***State v. Whiting***, 136 Wis. 2d 400, 418, 402 N.W.2d 723 (Ct. App. 1987). Importantly, none of the alleged false statements are material to the issue of great bodily harm. As there is no evidence that Krueger knew or believed that Joel's testimony was untrue, it cannot be said that Lisko's conviction was obtained through perjured testimony. *See* ***id.***

[5] Joel testified that he admitted to Lisko's accusations because he was trying not to get hurt.

[6] The Waukesha county criminal complaint stated that the boy's father "push[ed] [Joel's] face into the ground," not, as Lisko styles it, that he "proceeded to beat his face in."

*Falsus in Uno Instruction*

¶29 Lisko contends that Joel's testimony so contradicted the testimony he gave at his father's trial and otherwise was inconsistent such that the trial court erred when it refused to give the *falsus in uno* instruction. We disagree.

¶30 A trial court has wide discretion with respect to jury instructions, ***State v. Williamson***, 84 Wis. 2d 370, 393, 267 N.W.2d 337 (1978), due to its ability to observe the witnesses, ***Pumorlo v. City of Merrill***, 125 Wis. 102, 111, 103 N.W. 464 (1905). Moreover, the falsus in uno instruction is not favored. ***Williamson***, 84 Wis. 2d at 395. For it to be appropriate, "the false testimony must be on a material point and must be willful and intentional." ***Id.*** at 394.

¶31 After considering overnight whether to give the *falsus in uno* instruction, the court denied Lisko's request. It explained that the extent and nature of Joel's other prior misdeeds were not material to the issues in the case and the police report said nothing about a swollen eye. In our view, a reasonable inference is that Joel did not know precisely which blow, shove, dog attack, or even self-protective measure led to which particular injury and that having to testify against his father might have shaped some of Joel's testimony at that trial. We see no misuse of discretion.

*Juror Strike*

¶32 After Lisko's granddaughter, Brianna, testified for the defense, a juror advised the court that she recognized Brianna from high school. After questioning the juror, the court denied Lisko's motion to strike her for cause.

¶33 Whether to dismiss a juror for cause rests in the discretion of the court. ***State v. Zurfluh***, 134 Wis. 2d 436, 438, 397 N.W.2d 154 (Ct. App. 1986).

"A juror's personal knowledge of or acquaintance with a defendant or a witness, without more, is not such cause." ***Id.*** The juror also must believe he or she cannot decide the case fairly on the evidence. ***Id.***

¶34 Lisko moved to strike the juror on grounds she already had decided he was guilty. To be impartial, a juror must be indifferent and capable of basing his or her verdict solely upon the evidence developed at trial. ***State v. Faucher***, 227 Wis. 2d 700, 715, 596 N.W.2d 770 (1999). Voir dire answers that bespeak a made-up mind indicate "subjective bias." *See* ***State v. Mendoza***, 227 Wis. 2d 838, 849, 596 N.W.2d 736 (1999). "The court's determination of whether a juror is subjectively biased is a factual finding and will be upheld unless clearly erroneous." ***State v. Oswald***, 2000 WI App 2, ¶19, 232 Wis. 2d 62, 606 N.W.2d 207.

¶35 The voir dire revealed that, while the juror and Brianna had had some classes together and had some mutual friends, they did not seek to socialize outside of school and the juror had seen Brianna "maybe once" since graduating. The juror indicated that their acquaintance would not interfere with her duty as a juror. The court found that their relationship was not a close friendship, that the juror would not feel uncomfortable making a decision one way or the other, and that there was "absolutely no indication … that she has made up her mind in any fashion." These findings are not clearly erroneous.

*By the Court.*—Judgment affirmed.

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